

1987

# The State of Utah v. Sigifredo Eduardo Sierra : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. **870350-CA** IN THE UTAH COURT OF APPEALS

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|---------------------------|---|--------------------|
| THE STATE OF UTAH,        | ) |                    |
|                           | ) |                    |
| Plaintiff-Respondent,     | ) |                    |
|                           | ) | Case No. 870350-CA |
| vs.                       | ) |                    |
|                           | ) | Category No. 2     |
| SIGIFREDO EDUARDO SIERRA, | ) |                    |
|                           | ) |                    |
| Defendant-Appellant.      | ) |                    |

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BRIEF OF APPELLANT

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Appeal from a conviction of a second degree felony of possession of a controlled substance with intent to distribute for value and a sentence of a minimum term of incarceration of one year, not to exceed fifteen years, from the Fifth Judicial District Court, in and for Iron County, State of Utah, the Honorable J. Phillip Eves, District Judge, Presiding.

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**Court of Appeals**

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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|                           |   |                    |
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|                           | ) |                    |
| Defendant-Appellant.      | ) |                    |

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BRIEF OF APPELLANT

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JURISDICTION OF COURT OF APPEALS

The jurisdiction of the Utah Court of Appeals is established by 78-2a-3(2)(e), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a conviction of Possession of a Controlled Substance with Intent to Distribute for Value, a Second Degree Felony.

ISSUES PRESENTED ON APPEAL

Did the highway patrolman who stopped the Defendant's vehicle do so with reasonable suspicion to stop the Defendant's vehicle and conduct an investigation or was the stop made as a pretext to conduct further investigation of this particular vehicle and Defendant?

DETERMINATIVE STATUTES

The Statutes believed to be determinative in this case are 41-6-53 and 77-7-15, Utah Code Annotated, 1953, as amended.

The statutes are set forth hereinafter as they now read. 41-6-53, Utah Code Annotated, 1953, as amended, was amended by House Bill 231 of the 1987 legislature and became effective on April 27, 1987. A copy of the Bill is attached in the addendum hereto, but the Appellant does not claim that the alterations of the Statute are relevant to the issues on appeal.

41-6-53. Duty to operate vehicle on right side of roadway - Exceptions.

(1) On all roadways of sufficient width, a vehicle shall be operated upon the right half of the roadway, except:

(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing that movement;

(b) When an obstruction requires operating the vehicle to the left of the center of the roadway, but the operator shall yield the right-of-way to all vehicles traveling in proper direction upon the unobstructed portions of the highway within a distance constituting an immediate hazard;

(c) on a roadway divided into three marked lanes for traffic under the applicable rules; or

(d) on a roadway designed and signposted for one-way traffic.

(2) On all roadways a vehicle proceeding at less than the normal speed of traffic under the existing conditions shall be operated in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

77-7-15. Authority of peace officer to stop and question suspect - Grounds.

A peace officer may stop any person in a public place when he has reasonable suspicion to believe he has committed or is in the act of

committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

#### NATURE OF THE CASE

This is an appeal from a conviction of Possession of a Controlled Substance with Intent to Distribute for Value, a Second Degree Felony. The decision in this case will turn on the determination of the reasonableness of a highway patrolman's investigatory stop of a vehicle on the interstate freeway south of Cedar City, Utah.

#### COURSE OF THE PROCEEDINGS

The Defendant was arrested on March 6, 1987. A Preliminary Hearing was held on April 8, 1987, and the Defendant was bound over to the District Court for trial. The Defendant filed a Motion to Suppress the cocaine seized at the time of his arrest on the grounds that the stop made by the highway patrol trooper was pretextual in nature. The District Court based its decision upon the Preliminary Hearing for the reason that the Honorable J. Phillip Eves conducted the Preliminary Hearing as the Ninth Circuit Court Judge and then was appointed to the Fifth District Court bench and presided at the district court level as well. The Court denied the Motion to Suppress and thereafter the Defendant entered a plea of no contest.

#### DISPOSITION AT TRIAL COURT

After entry of the plea of no contest, the Defendant requested immediate sentencing and the Court imposed a sentence of not less than one nor more than fifteen years at the Utah



State Prison. No fine was imposed.

STATEMENT OF FACTS

On March 6, 1987, at 2:57 p.m., Officer Kirk Smith of the Utah Highway Patrol was traveling on Interstate Fifteen northbound near milepost 20 which is in the vicinity of Leeds, Utah (Preliminary Hearing Transcript, 6). At that time and place Trooper Smith saw a vehicle with New York license plates in front of him. Trooper Smith passed the vehicle on the left-hand side and noticed that the driver of the vehicle looked at the trooper and "then quickly looked back away from me and kinda bowed his head" (T. 7). The Trooper then requested the Cedar City dispatcher of the Utah Highway Patrol to run a computer check of the vehicle to determine if it might be stolen. At 3:09 p.m. the dispatcher replied to Trooper Smith that the vehicle was not stolen. However, Trooper Smith testified, "due to the suspicious nature and the way the subject had reacted when he seen (sic) me, I told Cedar that I was going to go after the vehicle, that I was going to check the vehicle more closely, and I asked if she had anybody in the area that she could send someone to assist me with this vehicle" (T. 7) (Transcript pages 7 and 8 are included in the Addendum). Trooper Smith then accelerated his vehicle in order to find the car with the New York license plate and traveled faster than the speed limit in order to locate the vehicle (T. 26). Trooper Smith caught up with the vehicle at milepost 49 which is located in Iron County, and at the Preliminary Hearing he testified, "I decided I'd stop

this vehicle and explain to him our left-lane law" (T. 8). Trooper Smith had followed the vehicle in the left-hand lane for forty to fifty seconds as the vehicle traveled fifty-six miles per hour and passed two other vehicles. Trooper Smith testified that the suspect car could have yielded on several occasions, but remained in the left-hand lane (T. 27). Trooper Smith testified that the suspect vehicle was in the left-hand lane for approximately ten seconds after passing the second of the two cars before the Trooper turned on his red light and signaled the vehicle to pull over (T. 28).

At the Motion to Suppress Hearing on May 19, 1987, the Defendant testified that when the Highway Patrolman saw him initially that he looked at the speedometer but did not attempt to hide his face from the Trooper (Motion to Suppress Transcript, 4). The Defendant also testified that he was traveling in the right-hand lane and was traveling at 55 miles to 56 miles per hour ( Motion to Suppress Transcript, 5).

Trooper Smith stopped the vehicle and asked Mr. Sierra for his drivers license and the registration of the vehicle. Mr. Sierra could not produce his drivers license but did present the registration card (T. 10).

Trooper Smith thereafter went through a detailed series of investigative procedures which resulted in the arrest of the Defendant and the issuance of a search warrant. The vehicle was taken to Cedar City, Utah, and the gas tank removed from the vehicle. A secret compartment was disclosed and fifteen taped

packages were removed which were found to contain 31.3 pounds of cocaine that tested 96% pure (T. 29).

#### SUMMARY OF ARGUMENT

It is the Defendant-Appellant's contention that the highway patrol trooper had no reasonable suspicion to believe that the Defendant-Appellant had committed or was in the act of committing a public offense as set out in 77-7-15, Utah Code Annotated, 1953, as amended.

The Defendant-Appellant also contends that the officer's intent to inform the Defendant-Appellant of the "left-lane law", 41-6-53, Utah Code Annotated, 1953, as amended, was used as a pretext by the officer to conduct an investigation which otherwise could not be supported by reasonable suspicion.

#### ARGUMENT

##### POINT I

TROOPER SMITH HAD NO REASONABLE SUSPICION TO BELIEVE THAT THE DEFENDANT-APPELLANT WAS IN THE ACT OF COMMITTING A PUBLIC OFFENSE.

The testimony at the Preliminary Hearing in this case indicates that Trooper Smith became curious about the Defendant-Appellant and at 2:57 p.m. requested a computer check on the vehicle to determine whether or not it was stolen. At 3:09 p.m. the Trooper was informed that the vehicle was not stolen. However, the Trooper determined that the Defendant-Appellant had displayed a "suspicious nature" (T. 7) and at that point determined that he should follow the vehicle and thereafter traveled an additional 29 miles in order to "check

the vehicle more closely" (T. 7).

The constitutional basis for statutes similar to 77-7-15, Utah Code Annotated, 1953, as amended, is originally found in Terry v. Ohio, 392 U.S.1(1968). Terry established the proposition that an officer must have articulable facts upon which he could base a reasonable suspicion which then would support an investigatory stop of a suspect. The Utah Supreme Court has recently addressed the "reasonable suspicion" standard of 77-7-15, Utah Code Annotated, 1953, as amended, and found that "reasonable suspicion" was not present in two separate cases. In STATE V. CARPENA, 714 P.2d 647 (1986) the Utah Supreme Court found that a car with an out-of-state license plate moving slowly through a neighborhood late at night was not sufficient evidence to support a reasonable suspicion allowing an investigatory stop. In STATE V. SWANIGAN, 699 P.2d 718 (1985), our Court found that an officer lacked a reasonable suspicion to stop a Defendant and his companion when an officer had been told by a fellow policeman that the Defendant and his companion had been walking along a street at a late hour where recent burglaries had been reported.

In the instant case, the fact that the Defendant "quickly looked back away from me and kinda bowed his head" (T. 7) cannot be seen as an articulable fact which would support a reasonable suspicion that the Defendant was engaged in criminal conduct.

## POINT II

THE TROOPER'S STOP OF THE DEFENDANT TO INFORM HIM OF THE "LEFT-LANE LAW" WAS A PRETEXT TO CONDUCT AN INVESTIGATORY STOP WHICH WAS UNSUPPORTED BY REASONABLE SUSPICION.

At the time that the Defendant-Appellant's vehicle was stopped, the Trooper making the stop had already been informed that the vehicle was not stolen. However, the Trooper had announced his intention to the dispatcher to "go after the vehicle" (T. 7) and had even requested that the dispatcher send someone for backup (T. 7). It would be unreasonable to presume that a Highway Patrol Trooper whose intention is to inform a driver of the "left-lane law" would need to have backup for such a stop.

The trial court in its Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Suppress specifically found that the Trooper had no pre-conceived idea that the Defendant-Appellant was a drug courier. Still, the Trooper's subsequent conduct in investigating the vehicle and its gas tank and gas gauge cannot support any other conclusion except that the traffic stop was made as a pretext to conduct a more detailed investigation for drugs.

Careful reading of 41-7-53, Utah Code Annotated, 1953, as amended, in light of the facts of this case, makes it difficult to determine that the Trooper had any reason to suspect that the Defendant-Appellant was violating the "left-lane law". Under sub-paragraph (1)(d) of the Statute this was definitely a roadway designed for one-way traffic since it was the northbound

lane of the Interstate Freeway. As long as the Defendant-Appellant was traveling at the normal speed of traffic, he could lawfully operate his vehicle in the left-hand lane. Apparently he was doing so at 56 miles per hour and passing two other slower vehicles.

Under all the factual circumstances of this case, it can only be concluded that the Trooper's decision to stop the Defendant-Appellant and discuss with him the "left-lane law" was a pretext for other investigatory purposes. Numerous cases have been decided where a stop has been determined to be pretextual in nature. The first "pretext" case was United States v. Lefkovitz, 258 U.S. 452 (1932) wherein the United States Supreme Court announced that "an arrest may not be used as a pretext to search for evidence." In United States v. Keller, 499 F. Supp 415(1980) the Defendant was stopped because his vehicle had only one license plate. He was then arrested and taken into custody and searched and stolen credit cards were recovered. The Federal Court in that case determined that the Defendant's arrest was pretextual. In United States v. Millio, 588 F. Supp 45 (1984) the prosecution and the defense stipulated that the surveillances of the Defendant were instigated to determine if the Defendant could objectively be stopped for a traffic violation. The Defendant was stopped for a traffic violation and a firearm was recovered. In the circumstances of that case the stop was determined to be pretextual. The firearm was determined to have been illegally seized and the Defendant was discharged.

In United States v. Smith, 799 F.2d 704 (11th Cir. 1986) the Officer questioned was looking for vehicles matching a drug courier profile. He observed the Defendant's car to weave six inches to the right of the right-hand lane line and then near but not over the painted center line of the highway. The stop of the Defendant's car was found to be pretextual and the conviction was reversed. In In United States v. Cruz, 581 F.2d 535 (5th Cir. 1978) the Court determined that a part-time Deputy Sheriff followed a vehicle for one mile and then stopped the vehicle to advise the driver that he had made an illegal U-turn and that such turns were dangerous. The Court found the stop to be a pretext to investigate for the presence of illegal aliens. The Defendant's were discharged and the conviction vacated. In Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968), an Officer on a narcotics stakeout watched the Defendant circle a city block numerous times making sharp left turns which were executed illegally. The narcotics officer called for other officers to stop the Defendant's vehicle. The other officers observed the Defendant driving 36 miles per hour in a 30 miles per hour zone prior to the stop. The Court in that case determined that the traffic stop was used as a pretext for a narcotics search and suppressed the evidence gained in the search and discharged the Defendant. In Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961), the officers were given a Warrant of Arrest to arrest the Defendant for failing to signal and having faulty brake and signal lights. The Warrant was obtained by a

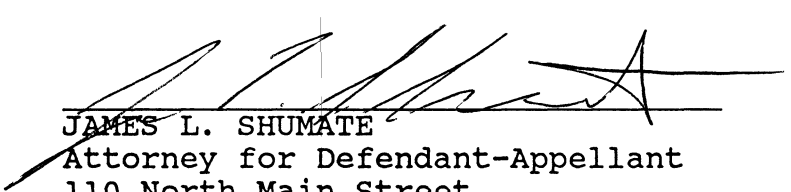
vice squad officer who had observed the violations the night before. The officers making the arrest were told that the Defendant was likely to have marijuana cigarettes in his possession. The Ninth Circuit Court in Taglavore pointed out that it was permissible to search incident to an arrest, but not vice versa.

In all of the above cited cases, Courts have determined that traffic stops were pretextual and used merely as a screen for the investigatory procedures which were the objective of the arresting officers. The record in this case can only support the proposition that Trooper Smith was using the "left-lane law" as an excuse to stop the Defendant-Appellant's vehicle and conduct further investigations which would otherwise be unwarranted.

#### CONCLUSION

Because the officer had no reasonable suspicion to believe that the Defendant-Appellant had committed a public offense and because the "traffic stop" was merely a pretext to conduct an investigatory stop, the Defendant-Appellant's conviction should be reversed and his case should be remanded to the trial court where the evidence should be ordered suppressed.

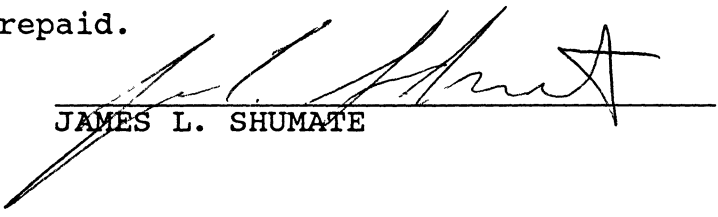
Respectfully submitted this 30<sup>th</sup> day of October, 1987.

  
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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. David L. Wilkinson, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 30<sup>th</sup> day of October, 1987, first class postage fully prepaid.

  
JAMES L. SHUMATE

which is a part of a highway ~~and if~~. If it finds ~~that such~~ the structure ~~cannot~~ may not with safety, withstand vehicles traveling at the speed otherwise permissible under this chapter, the Department of Transportation shall determine ~~and declare~~ the maximum speed of vehicles which ~~such~~ the structure can withstand, and shall cause or permit suitable signs stating ~~such~~ the maximum speed to be erected and maintained before each end of ~~such~~ the structure.

(3) Upon the trial of ~~any~~ a person charged with a violation of this section, proof of ~~said~~ the determination of the maximum speed by the Department of Transportation and the existence of ~~said~~ the signs ~~shall~~ constitute conclusive evidence of the maximum speed which ~~can~~ may be maintained with safety ~~to such~~ on the bridge or structure.

#### Section 50. Section Amended.

Section 41-6-51, Utah Code Annotated 1953, is amended to read:

#### 41-6-51. Speed contest or exhibition on highway - Barricade or obstruction.

~~(a) No~~ (1) A person ~~shall~~ may not engage in any motor vehicle speed contest or exhibition of speed on a highway ~~and no person shall~~ or aid or abet in any ~~such~~ motor vehicle speed contest or exhibition on any highway.

~~(b) No~~ (2) A person ~~shall~~ may not, for the purpose of facilitating or aiding or as an incident to any motor vehicle speed contest upon a highway, in any manner obstruct or place any barricade or obstruction or assist or participate in placing any ~~such~~ barricade or obstruction upon any highway.

#### Section 51. Section Amended.

Section 41-6-52, Utah Code Annotated 1953, is amended to read:

#### 41-6-52. Speed violation - Complaint - Civil negligence.

~~(a)~~ (1) In every charge of violation of any speed ~~regulation in this act~~ provision of this article, the complaint ~~and~~ and the summons or notice to appear ~~shall specify the speed at which the defendant is alleged to have driven~~ operated a vehicle, also the prima facie speed applicable within the district or at the location.

~~(b)~~ (2) The provisions of this ~~act~~ article declaring prima facie speed limitations ~~shall not be construed to~~ do not relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of an accident.

#### Section 52. Section Amended.

Section 41-6-53, Utah Code Annotated 1953, as last amended by Chapter 207, Laws of Utah 1975, is amended to read:

#### 41-6-53. Duty to operate vehicle on right side of roadway - Exceptions.

~~(a) Upon~~ (1) On all roadways of sufficient width, a vehicle shall be ~~driven~~ operated upon the right half of the roadway, except ~~as follows~~:

~~(1)~~ (a) when overtaking and passing another vehicle proceeding in the same direction under the rules governing ~~such~~ that movement;

~~(2)~~ (b) when an obstruction ~~exists making it necessary to drive~~ requires operating the vehicle to the left of the center of the roadway ~~provided any person so doing~~, but the operator shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portions of the

highway within ~~such~~ a distance ~~as to constitute~~ constituting an immediate hazard;

~~(3) Upon~~ (c) on a roadway divided into three marked lanes for traffic under the applicable rules ~~applicable thereon~~; or

~~(4) Upon~~ (d) on a roadway designed and signposted for one-way traffic.

~~(b) Upon~~ (2) On all roadways ~~any~~ a vehicle proceeding at less than the normal speed of traffic ~~at the time and place~~ under the existing conditions ~~then existing~~ shall be ~~driven~~ operated in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

#### Section 53. Section Amended.

Section 41-6-54, Utah Code Annotated 1953, is amended to read:

#### 41-6-54. Passing vehicles proceeding in opposite directions.

~~Drivers~~ Operators of vehicles proceeding in opposite directions shall pass each other to the right ~~and upon~~. On roadways having width for not more than one line of traffic in each direction, each ~~driver~~ operator shall give to the other at least one-half of the main traveled portion of the roadway as nearly as possible.

#### Section 54. Section Amended.

Section 41-6-55, Utah Code Annotated 1953, as last amended by Chapter 194, Laws of Utah 1985, is amended to read:

#### 41-6-55. Overtaking and passing vehicles proceeding in same direction.

The ~~following rules govern the~~ overtaking and passing of vehicles proceeding in the same direction ~~is~~ is subject to the following provisions:

(1) The ~~driver~~ operator of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance and may not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

(2) The ~~driver~~ operator of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle and may not increase the speed of his vehicle until completely passed by the overtaking vehicle.

(3) On a ~~road~~ highway having more than one lane in the same direction, the ~~driver~~ operator of a vehicle traveling in a left lane shall, upon being overtaken by another vehicle in the same lane, yield to the overtaking vehicle by moving safely to the right, and may not impede the movement or free flow of traffic in a left lane except:

(a) when overtaking and passing another vehicle proceeding in the same direction ~~under the rules governing this movement~~;

(b) when preparing to turn left;

(c) when reasonably necessary in response to emergency conditions;

(d) to avoid actual or potential traffic moving onto the right lane from an acceleration or merging lane; or

(e) when necessary to follow ~~the highway~~ direction signs that direct use of a lane other than the right lane.

~~(4) Violation of this section is a class B misdemeanor.~~

1           A.     At that time I noticed a vehicle in front of me  
2     that bore New York license plates. The number on the license  
3     plate was KGY554, had one subject driving. I took note  
4     of the license number and as I proceeded to pass the vehicle  
5     on the left side, the driver looked over at me and then  
6     quickly looked back away from me and kinda bowed his head.  
7     This action made me rather suspicious so I called our Cedar  
8     dispatch to ask if she could check the NCIC, which is the  
9     National Computer, to see if there was a possibility this  
10    vehicle was stolen.

11           MR. SHUMATE: Could we hold for a translation  
12    on that, your Honor?

13           THE COURT: Certainly.

14           MR. SHUMATE: Thank you.

15           THE COURT: All right.

16           Q.     (By Mr. Oehler) What happened then?

17           A.     The time on that was about 2:57. At 3:09 p.m.  
18     Cedar dispatch informed me that the vehicle was not listed  
19     as stolen, but due to the suspicious nature and the way  
20     the subject had reacted when he seen me, I told Cedar that  
21     I was going to go after the vehicle, that I was going to  
22     check the vehicle more closely, and I asked if she had anybody  
23     in the area that she could send someone to assist me with  
24     this vehicle.

25           MR. SHUMATE: Your Honor, could we hold again for

1 a translation?

2 THE COURT: Certainly.

3 Q (By Mr. Oehler) Tell us what took place then.

4 A At that time I left the Leeds area and started north  
5 on I-15. At approximately Milepost 49, I again encountered  
6 the subject vehicle. This time the vehicle was traveling  
7 at 56 miles per hour and it was in the left lane.

8 Q Is Milepost 46 in Cedar?

9 A Forty-nine.

10 Q Forty-nine. Is that in Iron County?

11 A Yes, it is in Iron County.

12 Q Okay. What did you see next?

13 A Well, I followed the vehicle about 40 seconds --  
14 40 to 50 seconds, somewhere like that, but not a real  
15 long time, in the left lane. And as we passed two vehicles,  
16 I decided I'd stop this vehicle and explain to him our  
17 left-lane law, give him a warning for traveling in the left  
18 lane and not yielding immediately. He had a couple opportunities  
19 to get into the right lane even though he had passed a couple  
20 of vehicles. I decided that I would pull him over at that  
21 point and inform him of our left-lane law.

22 We were in the left when I activated my red spotlight.  
23 The subject yielded immediately, pulled his vehicle to the  
24 right and stopped in the emergency lane.

25 MR. SHUMATE: Could we hold again for translation,